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71475—23——1

In the Supreme Court of the United States.

OCTOBER TERM, 1923.

PEORIA & PEKIN UNION RAILWAY COMPANY
v.
UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY. } No. 318.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

On January 8, 1923, the Interstate Commerce Commission (Tr. 49) entered an order for a general investigation into and concerning the lawfulness of the rates, charges, regulations, and practices of the Peoria & Pekin Union Railway, and railroads with which it connects at and in the vicinity of Peoria, Ill., as applied to traffic to, from, and via Peoria, including the lawfulness of existing contracts between the Peoria & Pekin Union Railway and the so-called tenants of that railroad; also the lawfulness of existing joint rates via Peoria, and the divisions thereof,

on traffic moving in connection with the Peoria & Pekin Union Railway, and the nature and extent of the facilities furnished and services rendered by any of the respondents to other of the respondents at or near Peoria, whether in make-up or break-up yards, spotting, intermediate, or terminal service, or otherwise including facilities furnished or services rendered in respect of traffic moving on combination rates which break on Peoria, and the compensation therefor as between respondents; with a view of determining just and reasonable individual and joint rates, charges, regulations, divisions, and practices and requiring establishment thereof by order.

By the same order two other closed cases were reopened and consolidated with the general investigation, and further hearings were fixed for February 20, 1923, at Chicago. (Tr. 50.) Notice was given to all of the interested carriers who were made respondents.

The previous cases and proceedings indicated that certain unsolved predominating questions necessitated for their final determination the general investigation.

First. Whether Peoria & Pekin Union Railway is a common carrier by railroad subject to the act to regulate commerce as found in the report of the Commission of April 13, 1922 (68 I. C. C. 412, 417; Tr. 33, 38); and if so—

Second. What service does it render as such, for whom, and what shall be the nondiscriminatory reasonable rates, fares, and charges therefor?

Third. Whether the tracks and facilities of Peoria & Pekin Union Railway are mere extensions of those of its tenant lines for whom it acts as agent (and not as a common carrier by railroad subject to the act) in conducting an underlying switching and terminal business as found in the report of the Commission of December 22, 1922. (77 I. C. C. 43, 49; Tr. 40, 46.)

Fourth. Under what circumstances does it act as agent for and perform an underlying terminal and switching service for its tenant lines, what compensation is paid therefor, by whom, and what favoritism or discrimination, if any, has been practiced in connection therewith?

Fifth.—What compensation is Peoria & Pekin Union Railway entitled to receive for the service which it renders and by whom and to whom is it payable?

Pending the final hearing and solution of these predominating questions the Peoria & Pekin Union determined to settle the whole matter for itself.

The Commission declared "an emergency is thereby created which requires immediate action of the Commission" (Tr. 14) and by Service Order No. 37 (Tr. 13) directed that Peoria & Pekin Union Railway "shall with reasonable promptness and diligence continue to interchange freight traffic between the Minneapolis & St. Louis Railroad Company and connecting carriers at the regularly established interchange points at and in the vicinity of Peoria" (Tr. 14).

Peoria is a railroad gateway located in central Illinois on the west bank of the Illinois River, which flows in a southerly direction. Pekin is located on the east bank of the river nine miles south of Peoria. Peoria & Pekin Union is located in what is commonly known as the Peoria-Pekin Switching District. On the west bank of the river it has a single track and on the east bank a double track (Tr. 34) between Peoria and Pekin, with terminal yards in Peoria, East Peoria, and points on the east bank of the Illinois River within the switching limits (Tr. 34).

The capital stock of Peoria & Pekin Union is jointly owned by the Illinois Central, C., C., C. & St. L., Lake Erie & Western, Chicago, Peoria & St. L., Chicago & North Western, and Toledo, Peoria & Western. These companies are known as the "tenant lines." (Tr. 34.) The Chicago & Alton and Pennsylvania companies have contracts with Peoria & Pekin Union under which the latter agrees to perform terminal services for them and under which they are granted certain rights to the use of the Peoria & Pekin Union facilities.

Minneapolis & St. Louis Railroad is a trunk line which enters Peoria from the west. ~~Its capital stock is owned by the Chicago & Alton and Rock Island Companies~~. Minneapolis & St. Louis formerly had a contract similar to those of the other companies named, which expired March 31, 1921. ~~Peoria & Pekin Union~~ declined to renew it but entered into a contract with the Rock Island whereby it uses the terminal facilities of that road at Peoria proper.

(Tr. 34.) Minneapolis & St. Louis and Peoria & Pekin Union have connections with the trunk lines at Peoria and Pekin and compete in the handling of both local and through traffic. Minneapolis & St. Louis can interchange traffic with all the trunk lines which enter Peoria proper except the Chicago & North Western without using Peoria & Pekin Union facilities. (Tr. 34.) The termini of the trunk lines serving Peoria from the south and east are at or near the East Peoria yards of Peoria & Pekin Union and traffic interchanged between those lines and the Minneapolis & St. Louis is handled by Peoria & Pekin Union.

Cars moving to Peoria over the rails of Minneapolis & St. Louis and going to tenant lines of Peoria & Pekin Union at East Peoria for outbound movement are delivered to Peoria & Pekin Union at Iowa Junction (Tr. 34), usually in trains with cars otherwise destined. These trains are switched by Peoria & Pekin Union to the East Peoria yards, where the trains are broken and the cars switched to designated tracks and placed in new trains for outbound movement. On this traffic Peoria & Pekin Union performs a train break-up, switching, and train make-up service. In the reverse direction Peoria & Pekin Union performs a similar service, except that it does not make up trains for Minneapolis & St. Louis, the cars being merely deposited in the latter's Bartlett Yards, situated just west of Iowa Junction. (Tr. 35.)

Cars moving to Peoria over the rails of Minneapolis & St. Louis, which are to move outbound via lines

which terminate at East Peoria, are taken in train lots by Minneapolis & St. Louis to Peoria & Pekin Union yards 90 and 91 in Peoria, about one mile from Iowa Junction. (Tr. 35.) Peoria & Pekin Union then switches the trains from yards 90 and 91 to the East Peoria yards, where they are broken up and the cars switched to appropriate tracks and placed in trains for outbound movement.

On August 30, 1921, Peoria & Pekin Union Railway established a charge of $4 for switching freight cars between the rails of Minneapolis & St. Louis at Peoria and its own tracks in its East Peoria yards when the cars come from or are destined to points beyond the switching district. On complaint of Minneapolis & St. Louis (Tr. 33) and after hearing, the Commission on April 13, 1922, found that Peoria & Pekin Union Railway (68 I. C. C. 417; Tr. 38)—

> * * * is an independent common carrier and as such entitled to just and reasonable compensation for the services which it renders. We are further of opinion and find that, with possibly the exception of traffic interchanged between protestant and the Chicago & North Western, defendant is not now compensated by the tenant lines for all of the service it renders in effecting transfers between those lines and nontenant lines, and may maintain reasonable tariff charges for such uncompensated service, provided in so doing it does not practice unlawful discrimination.
>
> Defendant performs interchange service between the rails of its tenants and the Chicago,

Burlington & Quincy and Chicago, Rock Island & Pacific and makes no charge for such service and receives no compensation therefor, except such as it receives under its contracts with its tenant lines. Complainant is in competition with the two lines mentioned in the handling of traffic from and to certain territories. Defendant, while stating that there is a distinction to be drawn between complainant and the two roads above mentioned, in that the latter have more extensive terminals at Peoria, does not attempt to justify in full the failure to make a charge on traffic interchanged with these roads, and states that negotiations are now under way looking to the securing of compensation from those lines for services for which it is not now compensated by its tenants. We are of opinion and find that the charges under consideration are unjustly discriminatory and unduly prejudicial against complainant and protestant.

On the same day the Commission entered an order directing the Peoria & Pekin Union Railway, on or before July 13, 1922, to remove the discrimination thus imposed on the Minneapolis & St. Louis. (Tr. 39.) Peoria & Pekin Union, on July 1, 1922, proposed to remove the discrimination by establishing similar charges for intermediate service on traffic to and from the Burlington and Rock Island. On the protest of the latter companies those tariffs were suspended. The previous case was then reopened and the two cases came on for further hearing. (77 I. C. C. 44; Tr. 40.)

On December 22, 1922, the Commission filed the second report (4 Commissioners dissenting and 1 absent) by which it again found (77 I. C. C. 48; Tr. 45):

> Should these tariffs become effective, where there are no joint rates and the combination rates break on Peoria, the charges will accrue against the traffic. The resulting increase of rates has not been justified, and this furnishes one ground for requiring the cancellation of the proposed schedules.
>
> There are other grounds for such action. The essential difficulty in this case is that what originally was primarily a terminal agency operating in a limited way within a limited territory has in the course of time expanded its facilities and enlarged the extent of the services it renders. The contracts under which it receives compensation from its proprietors, even should it assess and collect the proposed charges, are, by its own admission, insufficient to reimburse it fully for all the services it has in the past performed and now performs solely as their agent. Without first exacting adequate compensation from its proprietors or tenants by insisting upon a revision of the antiquated contract under which its compensation is fixed, it now contends that these services or certain of them are rendered by it as an independent common carrier, and seeks by tariff publication to exact compensation from nonproprietary connections.

There is here involved not only a very complicated concrete situation, but one which involves the fundamental question whether a common carrier may perform a service of common carriage as an agent for another common carrier, and if so, under what conditions as to the charges therefor, whether under contracts, or partly under contracts and partly by tariff publication. The unbroken construction put upon the interchange services of the Peoria & Pekin Union as well by its proprietors and tenants as by the respondent itself from February 1, 1881, until midsummer of 1921 is consistent only with the assumption that respondent in respect of these interchange services was exclusively an agent of its tenant lines and not a common carrier.

The Burlington has never paid anything to the respondent for interchange service. Until the present controversy the respondent never has claimed that it performed any service for the Burlington. Divisions with connections have always been arranged in conferences, at none of which has the Union ever been present. [Italics ours.]

Moreover, the local switching service, which the respondent performs on traffic originating or terminating at Peoria proper and moving via the tenant lines, is admittedly performed by the Peoria & Pekin Union, not as a common carrier but solely as an agent for its tenants.

Clearly the extent to which and the time during which the respondent acts as an agency and the extent and the time as to which it acts as a common carrier can not depend on its mere say-so. It can not for 40 years acquiesce in the rôle of agent and directly disclaim the responsibilities attaching to an independent common carrier, and immediately, upon its mere asservation as to its status or upon allegation or proof that it is not fully compensated by its principals for the service it has been claiming to perform as agent only, acquire the status of a common carrier and exert the latter's rights against connecting railroads.

In short, there is apparently something more necessary to clear up the situation here presented than the mere piecemeal filing of particular tariffs covering services now alleged to be those of a common carrier. We shall not prejudge the question of the status of the respondent nor the propriety of what rates or charges or divisions or practices should supplant the existing arrangements. In view of the determination made that these schedules have not been justified, it will suffice here to indicate that we shall on our own motion institute an investigation, making all parties to this case and all tenants of the Peoria & Pekin Union respondents, to the end that lawful, just, reasonable, and nonprejudicial practices, rates, and charges and divisions thereof shall be established for the services undertaken by them or any of them in connection with traffic moving to, from, through, or within the Peoria-Pekin district.

On the same day the Commission entered the order directing the Peoria & Pekin Union Railway, on or before January 31, 1923, to cancel the tariffs (Tr. 48), and a further order dismissing the complaint of the Minneapolis & St. Louis (Tr. 48).

The bill alleges that on January 2, 1923, after the Commission had suspended the tariff imposing charges against the Burlington and Rock Island companies, the Minneapolis & St. Louis served on Peoria & Pekin Union Railway Company notice that (Tr. 9)—

> In view of fact that order by I. C. C. in I. & S. Docket No. 1596 orders cancellation of tariffs carrying charges against Burlington and Rock Island and in view of fact that thereby discrimination as between this road and Burlington and Rock Island found to exist in original report in case No. 13110 is continued, this is to advise you that pending results of the general investigation in reference to practices, rates, and charges in connection with traffic moving from, through, to, or within the Peoria-Pekin District ordered by I. C. C. on its own motion the Minneapolis & St. Louis Railroad Company will refuse to make any further payments to your road under P. and P. U. Tariff I. C. C. No. 36 or any other tariff on account of switching charges on through traffic interchanged at Peoria with tenant lines of your road.

Telegraphic correspondence between the two companies and between the Peoria & Pekin Union and the Commission discloses that the Minneapolis & St. Louis, in view of the Commission's decisions and

the impending general investigation, declined to submit to the payment of the $4 per car which the Commission had found discriminatory and prejudicial. (Tr. 9.) By telegram the Commission reiterated that the charge against the Minneapolis & St. Louis was discriminatory and prejudicial so long as the Burlington and Rock Island were preferentially treated (Tr. 80) and asked assurance that traffic would not be interrupted during orderly disposition of questions. Peoria & Pekin Union Railway expressed hearty sympathy with the Commission's opinion that traffic should not be interrupted and, notwithstanding the Commission's finding (Tr. 82), denied there was any discrimination and prejudice against Minneapolis & St. Louis (Tr. 82).

On January 16, 1923, Peoria & Pekin Union wired the Commission that unless the Minneapolis & St. Louis made payment of the $4 per car for intermediate switching, Peoria & Pekin Union would, on and after January 20, 1923, accept cars from Minneapolis & St. Louis "for delivery to connections upon the payment of such charges in advance." (Tr. 83.)

On the sworn complaint of the Minneapolis & St. Louis (Tr. 52), which set out the controversy between it and Peoria & Pekin Union and its refusal to pay thereunder for the reasons stated, and that the refusal of Peoria & Pekin Union to receive traffic prejudiced the rights of the Minneapolis & St. Louis and flagrantly violated the right of the public to have the avenues of commerce open and operating (Tr. 97), the Commission issued the emergency order.

The bill was then filed. After hearing it was dismissed on the merits with a full opinion of the District Court (Circuit Judge Page and District Judges English and FitzHenry concurring). This appeal was then taken.

ARGUMENT.

I.

THE EMERGENCY ORDER WAS ENTERED ON THE PETITION OF MINNEAPOLIS & ST. LOUIS RAILROAD, A RESIDENT OF IOWA, AND THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS WAS WITHOUT JURISDICTION.

Urgent deficiencies act, October 22, 1913; c. 32, 38 Stat. 208, 219, provides:

> The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made.

The commerce court act provides (36 Stat. 539, 542):

> SEC. 3. Suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the commerce court against the United States.
>
> * * * * *
>
> SEC. 5. The Attorney General shall have charge and control of the interests of the Government in all cases and proceedings in the commerce court and in the Supreme Court of the United States upon appeal from the commerce court.
>
> * * * * *

The Interstate Commerce Commission and any party or parties in interest to the proceeding before the commission, in which an order or requirement is made, may appear as parties thereto, of their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party.

* * * * *

Communities, associations, corporations, firms, and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by anyone under the terms of this act * * * relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after the institution thereof.

Urgent deficiencies act provides (38 Stat. 220):

The procedure in the district courts, in respect to cases of which jurisdiction is conferred upon them by this act, shall be the same as that heretofore prevailing in the commerce court * * *. No interlocutory injunction suspending or restraining the enforcement, operation or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or

district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application.

The Congress has specifically provided in what manner the United States may be sued. It is settled that the United States can not be sued except with its consent and on its own terms. *Minnesota* v. *Hitchcock*, 185 U. S. 373, 386; *Oregon* v. *Hitchcock*, 202 U. S. 60; *United States* v. *Lee*, 106 U. S. 196, 207; *Kansas* v. *United States*, 204 U. S. 331, 341.

In the outset the Government filed a sworn answer specifically denying the allegation of the bill "that said Service Order No. 37 was not made upon the petition of any party or parties." (Tr. 50, 51.) The answer further alleged that the order was made on the petition of the Minneapolis & St. Louis Railroad, a copy of which was attached as Exhibit A. (Tr. 51, 52.) Minneapolis & St. Louis is a railroad corporation with its residence in the judicial district of the Southern District of Iowa. Documents were also filed to substantiate that allegation of the answer. (Tr. 56, 57, 67, 70.)

The original proceeding was commenced by the Minneapolis & St. Louis Railroad against Peoria & Pekin Union Railway Company. (Tr. 33.) In the order directing the general investigation there is no reference whatever to the exercise by the Commission of its emergency powers. (Tr. 49.) The filing of the bill in equity, the hearing in the District Court, and

this appeal, would never have been heard of had it not been for the filing before the Commission, on January 6, 1923, of the sworn complaint and application of the Minneapolis & St. Louis (Tr. 51, 52), which merely referred to the prior proceedings. Minneapolis & St. Louis invoked the aid and assistance of the Commission and asked that it exercise the emergency and other powers with which the law has surrounded the Commission, and that the Peoria & Pekin Union may be ordered, directed, and compelled to continue to handle the cars of Minneapolis & St. Louis in interchange at Peoria (Tr. 51, 55.)

Service Order No. 37 itself recites the filing of the complaint and application and the substance thereof as the basis for the order, thus (Tr. 13, 14):

> And it further appearing that a petition has been filed with the commission by the said Minneapolis & St. Louis Railroad Company from which it appears that the Peoria and Pekin Union Railway Company has indicated to it that unless certain claimed payments are made for certain claimed services performed by the said Peoria & Pekin Union Railway, it will refuse to interchange freight traffic between said Minneapolis & St. Louis Railroad and its connections at and in the vicinity of Peoria, Ill.;
>
> And it further appearing by said petition that the said Minneapolis & St. Louis Railroad Company is not now paying and is unwilling to pay any charges for the claimed service performed by the said Peoria & Pekin Union Rail-

way pending determination by this Commission of the controversy hereinbefore referred to;

And it further appearing that subsequent notice has been given to this Commission and to the Minneapolis & St. Louis Railroad Company that unless such claimed payments are made promptly it will discontinue to interchange freight traffic between the said Minneapolis & St. Louis Railroad and connecting carriers at and in the vicinity of Peoria, Ill., on and after 12 m. January 20, 1923;

And it further appearing that by reason of said notice of refusal of the Peoria & Pekin Union to interchange such traffic between said Minneapolis & St. Louis Railroad and connecting carriers, whether such traffic moves under joint or combination rates, and by reason of the refusal of the Minneapolis & St. Louis Railroad to pay any charges for the claimed services performed by the Peoria & Pekin Union Railway in interchange of such traffic, an emergency is thereby created which requires immediate action of the Commission.

Therefore, in order best to promote the service in the interest of the public and the commerce of the people, and in order that the constant flow of interstate commerce may not be interfered with, it is ordered and directed, effective forthwith and until the further order of the commission in the premises:

1. That the Peoria & Pekin Union Railway Company shall with reasonable promptness and diligence continue to interchange freight traffic between the Minneapolis & St. Louis Railroad Company and connecting carriers at

the regularly established interchange points at and in the vicinity of Peoria, Ill.

If Service Order No. 37 was not entered upon that complaint and application, on what was it entered? The prior proceedings pending before the Commission and the general order for the investigation are but incidental to the complaint and application which set in motion the emergency powers of the Commission. The fact that the Commission and the parties had conducted two proceedings which had been twice closed and again reopened by the order for the general investigation (Tr. 50), and which had informed the Commission to a considerable extent of the situation as outlined in the complaint and application for the emergency order, does not overthrow the statute prescribing the venue.

The words in the statute, "upon whose *petition* the order was made," are clear and unmistakable. While all that preceded the filing of the complaint and application for the emergency order might well be considered as information which justified the exercise of the emergency power, the order was not entered in those proceedings.

In *Illinois Central Railroad Co.* v. *Public Utilities Commission*, 245 U. S. 493, 504, 505, this Court said:

> The cross bills assailed the validity of the Commission's order on various grounds and concluded with a prayer that it be set aside and annulled and that the United States and the Commission be enjoined from enforcing it and the carriers from complying with it. Passing the fact that they were presented as

> *cross* bills, it is apparent that in subject matter and purpose they were suits to set aside the order. By statute such suits are required to be brought against the United States, Jud. Code, §§ 208, 211; c. 32, 38 Stat. 219–220, and the jurisdictional provision before mentioned permits them to be brought only in designated districts. Here the Eastern District of Missouri was the one designated, the order being one that was made upon the petition of a resident of that district. The United States had consented to be sued there, but not elsewhere, and, being suable only by its consent, could not be sued in a district not within the consent given. See *Finn* v. *United States*, 123 U. S. 227, 232–233; *Schillinger* v. *United States*, 155 U. S. 163, 166.
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> * * * * *
>
> * * * the United States is made by statute a necessary party to a suit to set aside an order of the Commission, and this means that it is to stand in judgment as representing the public. If the state authorities thought the order should be set aside and wished to test their right to affirmative relief along that line they should have resorted to the court empowered by law to entertain a suit of that nature.

Skinner & Eddy Corporation v. *United States*, 249 U. S. 557, 563, relied on by opposing counsel, is not controlling here. In that case this Court said (249 U. S. 563):

> *Second.* The defendants contend also that if the subject matter was within the jurisdic-

> tion of a District Court of the United States it was not within that of Oregon. The objection is based upon the Act of October 22, 1913, c. 32, 38 Stat. 208, 219, which declares: "The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made." And it is asserted that the parties upon whose petition the order was made, are the Merchants' Association of Spokane, a resident of the Eastern District of Washington, and the Railroad Commission of Nevada, a resident of the District of Nevada. The applications of these parties, filed in March, 1916, were doubtless instrumental in securing a reopening of the proceedings which resulted in the order complained of. But the proceedings in which the order was made were the original applications of carriers for relief under the fourth section. The report and the order are entitled "In the Matter of Reopening Fourth Section Applications." One of the carriers which had made such application for relief from the provisions of the fourth section was a resident of Oregon, namely, the Oregon-Washington Railroad and Navigation Company; and as it was joined as defendant in the suit, the District Court for Oregon had jurisdiction over the parties.

In that case the court emphasized that the "report and the order are entitled 'In the Matter of Reopening Fourth Section Applications.'" In this case the

order bears the caption of no proceeding and is styled "Service Order No. 37."

In that case the Court said: "The applications of these parties, filed in March, 1916, were doubtless instrumental in securing a reopening of the proceedings which resulted in the order complained of." In the instant case the complaint and application for the emergency order appears not to have been filed in any of the prior proceedings. It was addressed directly to the Commission and it prayed for specific relief. It was not a reopening or continuance of any prior proceeding, but the commencement of a new proceeding.

If the contention of opposing counsel is sound, it practically defeats the Congressional intent with respect to venue.

Section 5 of the Act to Regulate Commerce, approved June 29, 1906, amending Section 16 of the act approved February 4, 1887 (34 Stat. 584, 592), provides:

> The venue of suits brought in any of the circuit courts of the United States against the Commission to enjoin, set aside, annul, or suspend any order or requirement of the Commission shall be *in the district where the carrier against whom such order or requirement may have been made has its principal operating office*, and may be brought at any time after such order is promulgated. And if the order or requirement has been made against two or more carriers then in the district where any one of said carriers has its principal operating

> office, * * * and jurisdiction to hear and determine such suits is hereby vested in such courts.

Under that statute railroad companies invariably commenced suits in the districts wherein were located their principal operating offices, which were usually far away from the shippers or localities who had secured the orders. Thus if a complaint were filed by shippers at St. Paul or Omaha against a group of carriers which included the Pennsylvania Railroad and New York Central companies and the Commission entered an order which the carriers undertook to enjoin, the suit could have been brought in New York or Pennsylvania.

The instant case is a striking example of the old practice. Practically the entire line of the Minneapolis & St. Louis is located west of the Mississippi River, and that company and its shippers are deprived of the right to have their case heard and determined in the district of which the company is a resident. The Commerce Court Act was passed to meet such conditions. When the Urgent Deficiencies Act, which abolished the Commerce Court, was passed, the Congress simply turned end for end the old practice and compelled any carrier who sought to enjoin an order of the Commission to bring the suit in the district wherein was the residence of the party "on whose petition the order was made."

The learned District Court said (Tr. 100):

> There was no hearing whatever upon the Minneapolis & St. Louis petition of January 6th, and the only petition or complaint of the

> Minneapolis & St. Louis Railroad Company mentioned in the order is No. 13110, filed September 22nd, 1921, and which had been dismissed prior to the entry of Service Order No. 37, so that we are of opinion that Service Order No. 37 was not entered on the complaint or petition of the Minneapolis & St. Louis Railroad Company.

The complaint and application of the Minneapolis & St. Louis for an emergency order is fully recited in Service Order No. 37. The contents of the recitals of that order are made up almost entirely from the complaint and application; the two documents are interwoven. Without the complaint and application for an emergency order Service Order No. 37 would not have been entered. The Commission would not have entered that order on its own motion. Service Order No. 37 was not issued in the general investigation proceeding. It was issued in direct response to a petition styled *The Minneapolis & St. Louis Railroad Company*, Complainant, *vs. Peoria & Pekin Union Railway Company*, Respondent (Tr. 52).

Counsel for appellant say that the written petition or complaint of the Minneapolis & St. Louis was no more effective to set in motion the Commission's machinery than would have been the verbal message delivered by the Minneapolis & St. Louis to the Commission. (Br. 22.) That question, however, is not in the case. The complaint and application of Minneapolis & St. Louis and Service Order No. 37 speak for themselves. The decision of the Court will rest on their effect.

Opposing counsel further argue that the Government failed to appeal or to assign errors; therefore it is in no position to urge the question of lack of jurisdiction.

In *Procter & Gamble Co.* v. *United States,* 225 U. S. 282, the Commerce Court overruled the Government's challenge of its jurisdiction but held in favor of the Government on the merits of the case and dismissed the petition. On the appeal of the Procter & Gamble Company (but without appeal of the Government) this Court reversed the judgment with directions to dismiss the petition for want of jurisdiction.

Similarly, in *Skinner & Eddy Corporation* v. *United States,* 249 U. S. 557, the question of jurisdiction was raised in the District Court and overruled, but the bill was dismissed on the ground that it failed to state any cause of action. Skinner & Eddy Corporation appealed. The question of jurisdiction of the District Court was heard and determined by this Court without appeal by the Government.

The question of jurisdiction in the instant case was seasonably raised and determined adversely by the District Court. If the order of the Commission was entered on the complaint and application of the Minneapolis & St. Louis within the meaning of the venue statute, then the District Court was clearly without jurisdiction over the subject matter, which could not be conferred by consent or otherwise. The question is properly here for review. The court could raise the question *ex mero motu.*

II.

SERVICE ORDER NO. 37 WAS WITHIN THE POWER OF THE COMMISSION.

The appeal was from the order denying motion of Peoria & Pekin Union for a temporary injunction. Other than the answer raising the question of jurisdiction, the Government filed no pleading at the hearing of the motion. However, counsel for the Government, in addition to arguing the question of jurisdiction, also argued the case on the merits in opposition to the motion. The opinion of the District Court disposes of all questions on the merits and an affirmance by this Court would end the case.

Section 400 of the Transportation Act amending the first four paragraphs of Section 1 of the Interstate Commerce Act provides (41 Stat. 456, 474):

> (3) * * * The term "railroad" as used in this Act shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used in this Act shall include locomotives, cars, and other vehicles, vessels, and all instrumentali-

ties and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.

* * * * *

(4) It shall be the duty of every common carrier subject to this Act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof as between the carriers subject to this Act participating therein which shall not unduly prefer or prejudice any of such participating carriers.

Section 402 of the Transportation Act amending section 1 of the Interstate Commerce Act, provides (41 Stat. 476):

(10) The term "car service" in this Act shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, in-

cluding special types of equipment, and the supply of trains, by any carrier by railroad subject to this Act.

* * * * *

(15) Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine, (a) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission; (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; (c) to require such joint or common use of terminals, including main-line track or tracks for a reasonable distance outside of such terminals, as in

> its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; and (d) to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as it may determine, and to modify, change, suspend, or annul them. In time of war or threatened war the President may certify to the Commission that it is essential to the national defense and security that certain traffic shall have preference or priority in transportation, and the Commission shall, under the power herein conferred, direct that such preference or priority be afforded.

The learned counsel for Peoria & Pekin Union say (Br. 31):

> To give the Commission power to permit one railroad to use the facilities of another is an extraordinary power. *We are not arguing here against the constitutionality of the statute, particularly since such argument is unnecessary.* [Italics ours.]

The court will take judicial notice that Illinois is a coal-producing State and that coal is one of the greatest of all necessities which moves in heavy volume through all of the large terminals. All that the Commission did was to keep open a channel of interstate commerce in midwinter when there was a heavy movement of freight including coal.

On August 30, 1921, appellant established the charge of $4 per car which the Commission, by its order of April 13, 1922 (Tr. 39), condemned as discriminatory. Minneapolis & St. Louis, in its complaint and application for an emergency order, alleges that up to January 2, 1923, it paid the charge of $4 per car under the discriminatory and prejudicial tariff on all cars in eastbound interchange because it was satisfied Peoria & Pekin Union would refuse traffic in interchange, thus interfering with the flow of interstate commerce and cause great money loss to Minneapolis & St. Louis and damage to its business and patrons, if it refused to pay the charge. (Tr. 53, 54.)

After having paid a sum in excess of $210,000 and being unable to stand the burden longer, Minneapolis & St. Louis gave notice of its intention not to make further payments. As the Burlington and Rock Island companies were not paying similar charges and as the Peoria & Pekin Union had not filed any bill to enjoin the order of the Commission which condemned the tariff fixing the $4 charge as discriminatory and prejudicial, it certainly was in no position to exact those charges from the Minneapolis & St. Louis. Peoria & Pekin Union has already received $210,000 and its inability longer to collect charges under the condemned tariff does not justify its outcry of confiscation. (Tr. 54.)

It is difficult to understand wherein the order which directs that a channel of interstate commerce which has been open and in operation for 40 years shall be kept open is an appropriation of terminal

facilities. The record more nearly discloses an attempt on the part of Peoria & Pekin Union to confiscate and destroy the property of Minneapolis & St. Louis. To do that it is willing to go to the extreme of switching for the Burlington and Rock Island free of charge as it did for the Minneapolis & St. Louis (except as it received payments under the tenancy contracts) for 40 years.

In any case, counsel for appellant do not assail the validity of the statute. The Commission is investigating the subject to the end that if the carriers disagree upon the terms of compensation, the Commission may, under the statute, after subsequent hearings fix such compensation as may be just and reasonable. Appellant should not object to a short further continuance of its own 40 years' practice.

In *Pennsylvania Company* v. *United States*, 236 U. S. 351, 369, 371, the company refused to make certain reciprocal switching arrangements at New Castle for the cars of Buffalo, Rochester & Pittsburgh Ry., such as it had made with the Baltimore & Ohio and other companies. The Commission directed the Pennsylvania to cease and desist from the practice and the Pennsylvania brought suit to enjoin. The District Court denied application for temporary injunction and in affirming the decree this Court said:

> The third and last objection is that the effect of the order of the Commission is to appropriate the property of the Pennsylvania

Company without compensation to the use of the Rochester Company, in violation of the Constitution of the United States. Certainly the railroad can not maintain, in view of the provisions of the statute to which we have referred, that these terminal facilities are exempt from public regulation and under all circumstances subject to its own control, to be dealt with in such manner as it may see fit. This court recognized, in the case of *United States* v. *Terminal R. R. Ass'n*, 224 U. S. 383, that terminal facilities might be so used as to create monopolies, which it was within the power of Congress to control, a power which it might exercise within the prohibitions and limitations of the Sherman Act. So in the present case, all that the order requires the Pennsylvania Company to do is to receive and transport over its terminals by its own motive power, for the Rochester Company, as it does for other companies similarly situated, carload freight in the course of interstate transportation.

* * * * *

So here there is no attempt to appropriate the terminals of the Pennsylvania Company to the use of the Rochester Company. What is here accomplished is only that the same transportation facilities which are afforded to the shipments brought to the point of connection over tracks used in common by the Baltimore & Ohio Railroad and the Rochester Company, shall be rendered to the Rochester Company as are given to the Baltimore & Ohio

> Company under precisely the same circumstances of connection for the transportation of interstate traffic. All that the Commission ordered was that the Company desist from the discriminatory practice here involved, and in so doing we think it exceeded neither its statutory authority nor any constitutional limitation, and that the District Court was right in so determining.

Peoria & Pekin Union apparently stands not only in defiance of the order of the Commission but it undertakes to go to the extreme of shutting the Minneapolis & St. Louis out of the terminals entirely because the latter would not continue to pay a switching charge of $4 condemned as discriminatory and prejudicial. It now assails the emergency order of the Commission which compels it to keep its terminals open under a statute the validity of which is not questioned.

The language of the learned District Court is appropriate (Tr. 101, 102):

> It is alleged and not disputed that the identical service commanded by the order has been performed for more than forty years by plaintiff for the Burlington and Rock Island without any compensation being asked, and that that is the identical service which the Minneapolis & St. Louis is asking shall be performed for it without compensation. Of course that could not be the basis for taking plaintiff's property without compensation, but it does present a very strong

argument why the public should not be inconvenienced and suffer a discontinuance of that service while the Interstate Commerce Commission is investigating the question as to whether such a service should be compensated for, and, if so, what shall be the basis of the compensation.

The decree of the District Court should be affirmed.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

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In the Supreme Court of the United States.

OCTOBER TERM, 1923.

PEORIA & PEKIN UNION RAILWAY COMPANY, appellant,
v.
THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, et al., appellees.
No. 318.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

STATEMENT OF THE CASE.

This is an appeal from a decree of the United States District Court for the Northern Division of the Southern District of Illinois, Circuit Judge Page and District Judges English and Fitz Henry sitting (Rec. 102), denying a temporary injunction sought by the Peoria & Pekin Union Railway Company, appellant, to restrain the Interstate Commerce Commission and the United States, appellees, from enforcing the terms of the following order (R. 13) entered by Divi-

sion 5 of the Commission pursuant to the emergency provisions of the interstate commerce act:

SERVICE ORDER No. 37.

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 18th day of January, A. D. 1923.

The subject of routing freight traffic being under consideration, and it appearing that a controversy exists between the Minneapolis & St. Louis Railroad Company and the Peoria & Pekin Union Railway Company over the terms under which the said Peoria & Pekin Union Railway shall interchange freight traffic between the Minneapolis & St. Louis Railroad Company and connecting carriers at and in the vicinity of Peoria, Ill., which has been brought to the attention of the Commission by formal complaint filed by said Minneapolis & St. Louis Railroad under No. 13110;

And it further appearing that on the 8th day of January, 1923, the Commission, by order No. 14534, entered upon a general investigation into and concerning the lawfulness of the rates, regulations, and practices of the Peoria & Pekin Union Railway Company and railroads with which it connects at and in the vicinity of Peoria, Ill.;

And it further appearing that the complaint of said Minneapolis & St. Louis Railroad Company under No. 13110 has been reopened and consolidated with said general investigation under No. 14534;

And it further appearing that a petition has been filed with the Commission by the said Minneapolis & St. Louis Railroad Company from which it appears that the Peoria & Pekin Union Railway Company has indicated to it that unless certain claimed payments are made for certain claimed services performed by the said Peoria & Pekin Union Railway it will refuse to interchange freight traffic between said Minneapolis & St. Louis Railroad and its connections at and in the vicinity of Peoria, Ill.;

And it further appearing by said petition that the said Minneapolis & St. Louis Railroad Company is not now paying and is unwilling to pay any charges for the claimed service performed by the said Peoria & Pekin Union Railway pending determination by this Commission of the controversy hereinbefore referred to;

And it further appearing that subsequent notice has been given to this Commission and to the Minneapolis & St. Louis Railroad Company that unless such claimed payments are made promptly, it will discontinue to interchange freight traffic between the said Minneapolis & St. Louis Railroad and connecting carriers at an in the vicinity of Peoria, Ill., on and after 12 M. January 20, 1923;

And it further appearing that by reason of said notice of refusal of the Peoria & Pekin Union to interchange such traffic between said Minneapolis & St. Louis Railroad and connecting carriers, whether such traffic moves under joint or combination rates, and by

reason of the refusal of the Minneapolis & St. Louis Railroad to pay any charges for the claimed services performed by the Peoria & Pekin Union Railway in interchange of such traffic, an emergency is thereby created which requires immediate action of the Commission.

Therefore, in order best to promote the service in the interest of the public and the commerce of the people, and in order that the constant flow of interstate commerce may not be interfered with, it is ordered and directed, effective forthwith and until the further order of the Commission in the premises:

1. That the Peoria & Pekin Union Railway Company shall with reasonable promptness and diligence continue to interchange freight traffic between The Minneapolis & St. Louis Railroad Company and connecting carriers at the regularly established interchange points at and in the vicinity of Peoria, Ill.

2. That copies of this order be served upon the Peoria & Pekin Union Railway Company; Peoria Railway Terminal Company and W. G. Bierd and H. I. Battles, Receivers; the Minneapolis & St. Louis Railroad Company; the Chicago, Burlington & Quincy Railroad Company; the Chicago, Rock Island & Pacific Railway Company; the Chicago & Alton Railroad Company and William W. Wheelock and William G. Bierd, Receivers; Toledo, Peoria & Western Railway Company and S. M. Russell, Receiver; Illinois Central Railroad Company; the Atchison, Topeka & Santa Fe Railway Company; the Lake Erie & Western Railroad Company; the Cleveland, Cincinnati, Chicago

& St. Louis Railway Company; Chicago, Peoria & St. Louis Railroad Company and Bluford Wilson and William Cotter, Receivers; Chicago & North Western Railway Company; the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company; and St. Louis, Springfield & Peoria Railroad; and that notice of this order be given to the general public by depositing a copy hereof in the office of the Secretary of the Commission at Washington, D. C.

By the Commission, division 5:

GEORGE B. MCGINTY,
Secretary.

PROCEEDINGS BEFORE THE COMMISSION LEADING UP TO ISSUANCE OF SERVICE ORDER NO. 37.

Appellant, an Illinois corporation, operates a railway switching line between Peoria and East Peoria, Ill., and points in the vicinity of these two places. The rails of this company connect, on the west side of the Illinois River at or near Peoria, with the rails of the Minneapolis & St. Louis Railroad Company, the Chicago, Burlington & Quincy Railroad Company, the Chicago, Rock Island & Pacific Railway Company, the Chicago & North Western Railway Company, Toledo, Peoria & Western Railway Company, and the Peoria Railway Terminal Company, and connect, on the east side of the Illinois River at or near East Peoria, with the rails of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, Toledo, Peoria & Western Railway Company, Chicago, Peoria & St. Louis Railroad Company, Pennsylvania Railroad Company, Lake Erie & Western

Railroad Company, Chicago & Alton Railroad Company, the St. Louis, Springfield & Peoria Railroad, and Illinois Central Railroad Company. (R. 42, 43.) By reason of certain contracts, which are believed to be immaterial in this proceeding, the railroads mentioned, other than the Minneapolis & St. Louis Railroad Company, Chicago, Burlington & Quincy Railroad Company, the Chicago, Rock Island & Pacific Railway Company, Peoria Railway Terminal Company, and St. Louis, Springfield & Peoria Railroad, are known as tenants of appellant and for convenience will be so referred to in this brief. (R. 43, 79.)

Through traffic moving from or to the rails of the Minneapolis & St. Louis Railroad Company at Peoria, to or from the rails of the other railroads mentioned, at or near East Peoria, must be transported over the rails owned or used by appellant. At the time the Commission's service order was issued the Minneapolis & St. Louis Railroad and other railroads operating in and in the vicinity of Peoria had established through routes and through rates from points on and beyond the line of the Minneapolis & St. Louis Railroad Company to points on or beyond the lines of such other carriers, and in the reverse direction, and appellant, as a common carrier, participated in the transportation service over such through routes and under such through rates by hauling traffic between the rails of the Minneapolis & St. Louis Railroad Company in Peoria and appellant's yards in East Peoria. (R. 5, 38, 75, 87.)

By its tariff, I. C. C. No. 36, effective August 30, 1921, appellant filed with the Commission and published—

> intermediate switching rates on all freight cars coming from or destined to points beyond the Peoria-Pekin switching district regardless of origin or destination, except empties on which this company [appellant] receives a loaded haul one way. Intermediate service only. Apply following rates in dollars and cents per car between track connection with Minneapolis & St. Louis Railroad and Peoria and Pekin Union Railway tracks in East Peoria yards. Rate per car $4.00 (see note).
>
> NOTE.—Will not apply to switching service for tenant companies under tenancy contracts. (R. 75, 78.)

The Minneapolis & St. Louis Railroad Company, being called upon to pay this charge, filed with the Commission, on September 22, 1921, a complaint attacking the charge as unreasonable and unjustly discriminatory. (R. 33, 89.) The Commission, after a full hearing upon this complaint in Docket No. 13110, and in another docket, I. & S. No. 1455, involving proposed intermediate charges on similar traffic interchanged with the Peoria Railway Terminal Company, found (68 I. C. C. 412):

> We are of the opinion and find that defendant [appellant] is an independent common carrier and as such entitled to just and reasonable compensation for the services which it renders.

We are further of opinion and find that, with possibly the exception of traffic interchanged between protestant [Peoria Railway Terminal Company] and the Chicago & North Western, defendant is not now compensated by the tenant lines for all of the service it renders in effecting transfers between those lines and nontenant lines, and may maintain reasonable tariff charges for such uncompensated service, provided in so doing it does not practice unlawful discrimination.

Defendant performs interchange service between the rails of its tenants and the Chicago, Burlington & Quincy and Chicago, Rock Island & Pacific Railroads, and makes no charge for such service and receives no compensation therefor except such as it receives under its contracts with its tenant lines. Complainant [Minneapolis & St. Louis Railroad Company] is in competition with the two lines mentioned in the handling of traffic from and to certain territories. Defendant, while stating that there is a distinction to be drawn between complainant and the two roads above mentioned in that the latter have more extensive terminals at Peoria, does not attempt to justify in full the failure to make a charge on traffic interchanged with these roads, and states that negotiations are now under way looking to the securing of compensation from those lines for services for which it is not now compensated by its tenants. We are of opinion and find that the charges under consideration are unjustly discriminatory and

> unduly prejudicial against complainant and protestant.
>
> The records are not sufficiently developed to justify an expression of opinion as to what would constitute reasonable charges, * * *. (R. 38.)

On the same day the Commission ordered appellant to "cease and desist, on or before July 13, 1922, and thereafter to abstain from practicing the unjust discrimination" found in its report and "to establish, on or before July 13, 1922, * * * and thereafter to maintain charges or practices * * * which will avoid and prevent the unjust discrimination and undue prejudice found to exist in said report." (R. 39.) The proposed schedules applicable on traffic interchanged with the Peoria Railway Terminal Company were ordered canceled. (R. 40.)

By tariff I. C. C. 40, to become effective July 1, 1922, appellant proposed to remove the discrimination found by the Commission by publishing a charge for intermediate service on traffic to and from the Chicago, Burlington & Quincy Railroad Company and the Chicago, Rock Island & Pacific Railway Company, on the one hand, and appellant's "track connections with connecting lines in East Peoria yards," on the other hand. (R. 41, 75, 78.) The tariff also proposed changes in the charges formerly proposed on traffic to and from the Peoria Railway Terminal Company from and to the East Peoria yards. Upon protest of the three carriers

last mentioned the Commission, in I. & S. Docket No. 1596, suspended the tariff before it became effective. Upon petition of the Minneapolis & St. Louis Railroad Company, No. 13110 was reopened for further hearing in connection with I. & S. No. 1596. (R. 41.)

On December 22, 1922, the Commission, after hearings in both cases, found (77 I. C. C. 43) that the proposed charges in appellant's tariff I. C. C. No. 40 were not justified. The Commission in its report said:

> In short, there is apparently something more necessary to clear up the situation here presented than the mere piecemeal filing of particular tariffs covering services now alleged to be those of a common carrier. We shall not prejudge the question of the status of the respondent, nor the propriety of what rates or charges or divisions or practices should supplant the existing arrangements. In view of the determination made that these schedules have not been justified it will suffice here to indicate that we shall on our own motion institute an investigation, making all parties to this case and all tenants of the Peoria & Pekin Union respondents, to the end that lawful, just, reasonable, and nonprejudicial practices, rates, and charges, and divisions thereof, shall be established for the services undertaken by them or any of them in connection with traffic moving to, from, through, or within the Peoria-Pekin district. * * *
>
> In view of the investigation to be undertaken we shall here make no finding in No.

> 13110, and shall issue a formal order of dismissal in that case, without prejudice to recanvassing the situation there involved in the course of the investigation aforesaid.
>
> We find the proposed schedules have not been justified, and an appropriate order will be entered. (R. 46.)

The commission on the same day entered its order in I. & S. No. 1596, requiring appellant to cancel its tariff I. C. C. No. 40 on or before January 31, 1923, and entered its order in No. 13110 dismissing the complaint in that proceeding. (R. 48.)

On January 4, 1923, the president of appellant sent the following telegram to the Secretary of the Commission:

> Commission decision I. and S. Docket Fifteen Ninety Six original report thirteen one ten stop Minneapolis and St. Louis Railroad Company advises in view of such decision it refuses to make further payments to Peoria and Pekin Union Railway Company of charges named in tariff Eye See See number Thirty Six or any other tariff carrying charges on traffic interchanged at Peoria with tenant lines of Peoria and Pekin Union Railway Company stop This company construes decision of Commission to dismiss complaint of Minneapolis and St. Louis Railroad Company leaving tariff Eye See See number thirty six in full force and effect and stands ready and willing to accept all traffic offered in interchange on basis such tariff and has notified Minneapolis and St. Louis Railroad Company

> that unless settlements for handling of the traffic interchanged are made upon same basis heretofore existing it would be necessary to place that company upon cash basis requiring payment of tariff charges when cars are offered in interchange stop This for information of Commission concerning situation at Peoria stop. (R. 75, 80, 81.)

Commissioner Aitchison on January 5, 1923, replied by telegram as follows:

> Telegram to Secretary McGinty today. Order against Peoria and Pekin Union Railway still stands unrescinded with finding that its tariff on traffic interchanged with Minneapolis and St. Louis Railway is unduly prejudicial so long as Burlington and Rock Island are preferentially treated. Period. Commission is firmly of opinion that traffic through Peoria gateway must be kept moving in the public interest and desires assurances from you that there will be no interruption pending orderly disposition of any questions disputed between your company and common carriers connecting with you. Please answer. (R. 75, 80.)

In response to this telegram the president of appellant sent the following telegram, dated January 6, 1923:

> Your wire fifth controversy this company with Minneapolis and St. Louis assure you I am in hearty sympathy with Commission opinion that traffic should not be interrupted. However Minneapolis and St. Louis have notified me that they will refuse to pay charges on basis of existing tariff lawfully in effect

since Commission's order of December twenty second dismisses complaint of Minneapolis and St. Louis in docket one three one one naught in which discrimination was suggested cannot understand how there is now any existing discrimination order against Peoria and Pekin Union. Respectfully suggest that present status with Minneapolis and St. Louis which in practical effect has existed for nearly forty years should be continued pending general investigation. Mr. Fletcher legal counsel for this company in this matter will call on you Monday January eighth and explain our position more fully. (R. 82.)

On January 6, 1923, the Minneapolis & St. Louis Railroad Company filed a verified complaint with the Commission alleging, among other things, that a controversy existed between appellant and the Minneapolis & St. Louis Railroad Company as to the payment of the four-dollar intermediate switching charge provided for in appellant's tariff I. C. C. 36, above described; that the Commission's opinion and order in I. & S. 1596, which dismissed the complaint in No. 13110, "continues the unjust discrimination * * * found to exist in the original report in Docket 13110"; that this discrimination has not been removed by appellant; that the Minneapolis & St. Louis has been paying this charge up to January 2, 1923, on all cars in eastbound interchange; that the Minneapolis & St. Louis does not propose to make further payments, pending the Commission's general investigation; that appellant by telegram dated

January 4, 1923, indicated that unless such payments were made "it will refuse to accept traffic of this complainant and will again stop the flow of interstate commerce, thereby prejudicing the rights of this complainant and flagrantly violating the right of the public to have the avenues of commerce kept open and operated." In this complaint the Minneapolis & St. Louis asked the Commission "that you exercise the emergency and other powers with which the law has surrounded the Commission, and the same are invoked to the end that the respondent may be ordered, directed, and compelled to continue to handle the cars of this complainant in interchange at Peoria and moving under lawfully established rates provided in tariffs on file with the Commission * * *." (R. 52, 76.)

On January 8, 1923, the commission, in carrying out the intention expressed in its report of December 22, 1922, in I. & S. No. 1596, entered an order of investigation upon its own motion in No. 14534, into the complex situation existing in the Peoria-Pekin district. This order reads in part as follows:

> *It is ordered*, That the commission upon its own motion enter upon an investigation into and concerning the lawfulness of the rates, charges, regulations, and practices of the Peoria & Pekin Union Railway, and railroads with which it connects at and in the vicinity of Peoria, Ill., as applied to traffic to, from, and via Peoria, Ill., including the lawfulness of existing contracts between the Peoria & Pekin Union Railway Company and the so-

called tenants of that railroad, also the lawfulness of existing joint rates via Peoria, and the divisions thereof, on traffic moving in connection with the Peoria & Pekin Union Railway Company, and the nature and extent of the facilities furnished and services rendered by any of the respondents to other of the respondents at or near Peoria, whether in make-up or break-up yards, spotting, intermediate or terminal service, or otherwise, including facilities furnished or services rendered in respect of traffic moving on combination rates which break on Peoria, and the compensation therefor as between the respondents, with a view of determining just and reasonable individual and joint rates, charges, regulations, divisions, and practices, and requiring establishment thereof by order. (R. 11, 49, 77.)

Later in the day (January 8, 1923) an informal conference was held by Division 5 of the Commission at its office in Washington, at which counsel for appellant and counsel for the Minneapolis & St. Louis Railroad Company were present. The controversy between these companies was taken up at this conference, and an effort was made by the Commission to bring about an amicable settlement without interrupting the flow of traffic into and through Peoria. The Commission pointed out that it had already entered its order instituting a general investigation in No. 14534 with a view to effecting a reasonable adjustment of rates, divisions, and

charges as between the carriers, including appellant, at and in the vicinity of Peoria. (R. 76.)

On January 16, 1923, the president of the Peoria & Pekin Union Railway Company sent the following telegram to Commissioner Aitchison:

> Refer message sixth and Fletcher's conference with your division. Minneapolis and St. Louis Railroad still declines to make payments in accordance with tariff on file. I have to-day served notice on Minneapolis and St. Louis Railroad that unless payments are made as heretofore covering charges for intermediate switching performed by this company in accordance with tariff now on file with commission that on and after twelve noon Saturday, January twentieth, this company will accept only such cars for delivery to connections upon the payment of such charges in advance by the Minneapolis & St. Louis Company. This company stands ready to accept and handle all traffic promptly when offered in interchange or otherwise, but can not undertake to perform service without compensation. And in violation of tariff. This for your information. (R. 83.)

By reason of this notice of refusal of appellant to interchange the traffic under consideration between the Minneapolis & St. Louis Railroad Company and other carriers connecting with the Peoria & Pekin Union Railway Company at or near Peoria, whether such traffic moved under joint or combination rates, and by reason of the refusal of the Minneapolis & St. Louis Railroad Company to pay any charges

for the claimed services performed by the Peoria & Pekin Union Railway Company in interchange of such traffic, the Commission found that an emergency was thereby created which required immediate action by the Commission. Therefore, on January 18, 1923, the Commission, pursuant to the provisions of the interstate commerce act and more particularly paragraph (15) of section 1 of this act, entered Service Order No. 37, above quoted, requiring—

> That the Peoria & Pekin Union Railway Company shall, with reasonable promptness and diligence, continue to interchange freight traffic between the Minneapolis & St. Louis Railroad Company and connecting carriers at the regularly established interchange points at and in the vicinity of Peoria, Ill. (R. 14.)

PROCEEDINGS IN THE DISTRICT COURT.

On January 25, 1923, appellant filed its bill of complaint (R. 1) in the court below against the United States as defendant, and alleged, among other things, that "nowhere in the said act [interstate commerce act] or in any other act of Congress is the Interstate Commerce Commission given authority in emergency or otherwise to make an order of this kind. * * * The order is ultra vires and is consequently null and void" (R. 11); further, the order "directs plaintiff to perform an uncompensated service * * * for, * * * and furnish facilities to that company [the Minneapolis & St. Louis Railroad Company] without compensation, which has the effect of depriving plaintiff of its property without due process of law and

taking plaintiff's private property for public use without just compensation, contrary to the fifth amendment to the Constitution of the United States." (R. 12.) The prayer of the bill of complaint was that appellant "be granted a temporary injunction restraining the Interstate Commerce Commission and the United States from enforcing the terms of the said Service Order 37 and that upon final hearing of this cause a decree be entered adjudging the said service order to be in all respects null and void and ordering the same to be abrogated, cancelled, and set aside, and permanently enjoining the Interstate Commerce Commission and the United States of America from taking any steps to enforce the said order or from bringing any suits against the plaintiff for penalties." (R. 12.)

An answer to the bill of complaint was filed by the United States (R. 50) and, upon leave of court, answers were also filed by the Interstate Commerce Commission (R. 73) and the Minneapolis & St. Louis Railroad (R. 83). It was alleged, among other things, in the answers of the United States and of the Minneapolis & St. Louis Railroad that the order was made upon complaint of the Minneapolis & St. Louis Railroad and that the venue of the suit was, therefore, in the judicial district in which that railroad had its residence, namely the Southern District of Iowa, instead of the district in which the suit was brought (R. 51, 84).

In its answer the Commission, among other things, denied that Service Order 37 was beyond the

power of the Commission or that plaintiff was required by it to handle traffic without compensation (R. 75, 77).

Upon these pleadings and exhibits offered in evidence (Rec. 56, 81–83), the court below heard the case, denied the temporary injunction, and dismissed the bill. In a written opinion the court, after discussing the question of venue and deciding it in favor of appellant, proceeded to deal with the other questions in the case as follows:

> The dispute here involved between the Minneapolis & St. Louis Railroad, the P. & P. T. [Peoria Railway Terminal Co.], the Burlington, and the Rock Island, severally; on the one part and the plaintiff on the other, involves simply the moving and handling of cars over the tracks of the plaintiff between the carriers doing business through the Peoria gateway and involves the use of the terminals and facilities of the plaintiff, and we are of opinion that the Commission had the right to declare that an emergency existed and to promulgate the order in question.
>
> It is further urged, however, that the order is in violation of the fifth amendment because it directed the plaintiff to perform a service without any provision that it should get a compensation therefor, and that this was the taking of its property.
>
> We are of opinion that this, under all the circumstances of the case, can not be said to be true. While in the order itself the service is enjoined upon plaintiff without any compensation being there provided for, yet the

act above quoted under both "b" and "c" [Sec. 1(15) b, c] provides that the order may be entered on such terms as may be agreed upon or as the commission may, after subsequent hearing, find to be just and reasonable. But, in addition to this, though we do not deem it necessary to determine the situation of I. C. C. tariff No. 36, which was permitted to be filed and was afterwards found to be unjustly discriminatory against the Minneapolis & St. Louis, yet that tariff was not formally canceled, and it appears that the very purpose of the order was to hold in statu quo conditions at Peoria while the commission made the investigation set for February 20, 1923, the purpose of which was to determine what compensation if any, the plaintiff should receive not only from the Minneapolis & St. Louis but from the Burlington and the Rock Island, and possibly other questions. It is alleged and not disputed that the identical service commanded by the order has been performed for more than forty years by plaintiff for the Burlington and Rock Island without any compensation being asked, and that that is the identical service which the Minneapolis & St. Louis is asking shall be performed for it without compensation. Of course that could not be the basis for taking plaintiff's property without compensation, but it does present a very strong argument why the public should not be inconvenienced and suffer a discontinuance of that service while the Interstate Commerce Commission is investigating the question as to whether such a serv-

ice should be compensated for; and if so, what shall be the basis of the compensation.

We are of the opinion that the Interstate Commerce Commission acted within its powers and that the temporary injunction should be and is denied. (R. 101–102.)

QUESTIONS FOR DECISION.

The assignment of errors (R. 104), it is believed, raises the following two questions:

1. Was the Interstate Commerce Commission authorized by statute to issue Service Order No. 37?

2. Is this order in contravention of the fifth amendment to the Constitution?

ARGUMENT.

1. SERVICE ORDER NO. 37 WAS WITHIN THE AUTHORITY CONFERRED UPON THE COMMISSION BY THE INTERSTATE COMMERCE ACT, AND WAS ENTERED IN ACCORDANCE WITH THE DUTIES IMPOSED UPON THE COMMISSION BY THIS ACT.

The authority to make Service Order No. 37 is conferred upon the Commission by section 1 of the interstate commerce act and more particularly paragraph (15) of this section. This paragraph should be read in connection with paragraph (10) of section 1. These two paragraphs read as follows:

> (10) The term "car service" in this act shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this act.

(15) Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine: (a) To suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission; (b) *to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable;* (c) *to require such joint or common use of terminals, including main-line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable;* and

> (d) to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as it may determine, and to modify, change, suspend, or annul them. In time of war or threatened war the President may certify to the Commission that it is essential to the national defense and security that certain traffic shall have preference or priority in transportation, and the Commission shall, under the power herein conferred, direct that such preference or priority be afforded. (Italics ours.)

The provisions quoted should also be considered in connection with the provisions of paragraph (16) of section 1, which authorizes the Commission, in case a carrier is unable to transport the traffic offered it so as properly to serve the public, to "make such just and reasonable directions with respect to the handling, routing, and movement of the traffic of such carrier and its distribution over other lines of roads as in the opinion of the Commission will best promote the service in the interest of the public and the commerce of the people." Paragraph (4) of section 15, which authorizes the commission to prescribe through routes with certain limitations, contains a proviso that "in time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission it may * * * establish temporarily such through routes as in its opinion are necessary or desirable in the public interest."

The provisions quoted evidence a clear intent by Congress to intrust the Commission with the affirmative administrative duty to keep the transportation system of the country intact; to prevent interruptions in the flow of traffic through the regular channels of commerce; to require the continued handling of through traffic by carriers over their lines in spite of quarrels between them as to the terms of handling the traffic; and to take such action with respect to the handling of cars and the movement of traffic as "to maintain an adequate railway service for the people of the United States."

In *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, this court in commenting upon the transportation act of February 28, 1920, which enlarged the emergency car service powers first given to the Commission by the amendment of May 29, 1917, to the act to regulate commerce, used the following language at page 585:

> It is manifest from this very condensed recital that the act made a new departure. * * * The new measure imposed an affirmative duty on the Interstate Commerce Commission to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States. This is expressly declared in section 15a to be one of the purposes of the bill.

In the *New England Divisions Case*, 261 U. S. 184, this court, at page 189, further commented upon the Transportation Act as follows:

> Transportation Act, 1920, introduced into the Federal legislation a new railroad policy. *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, 585. Theretofore the effort of Congress had been directed mainly to the prevention of abuses; particularly those arising from excessive or discriminatory rates. The 1920 act sought to insure, also, adequate transportation service. That such was its purpose Congress did not leave to inference. The new purpose was expressed in unequivocal language. And to attain it new rights, new obligations, new machinery, were created. The new provisions took a wide range. Prominent among them are those specially designed to secure a fair return on capital devoted to the transportation service. Upon the Commission new powers were conferred and new duties were imposed.

In footnotes to the language above quoted references were made, among other things, to the car-service provisions now under consideration.

The construction of the statute, claimed by appellant, that paragraph (15) of section 1 authorizes the commission merely to deal with cars, locomotives, and other vehicles, and not to direct the movement of traffic as in the present case, is not justified, it is submitted, by the language of the provisions quoted and would defeat the intent and purpose of the statute. The following language of this court in *Interstate Comm. Comm.* v. *Ill. Cent. R. R.*, 215 U. S. 452, 477, in dealing with the con-

tention that the Commission had no authority under section 15 of the act to regulate commerce to prescribe rules of car distribution because that section authorized the Commission to deal only with regulations or practices affecting rates, is apposite here:

> The contention gives to the words found in the earlier part of the section, "any regulation or practice whatsoever of such carrier or carriers affecting such rates," a dominant and controlling power so as to cause them to limit every other provision in the section, however general in its language. We do not stop to critically examine the provision relied upon for the purpose of pointing out, as a matter of grammatical construction, the error of the contention, because we think, when the text of the section is taken into view and all its provisions are given their natural significance, it obviously appears that the construction relied upon is without foundation, and that to sustain it would be to frustrate the very purpose which it is clear, when the entire provision is considered, it was designed to accomplish, and thus would be destructive of the plain intent of Congress in enacting the provision.

For other cases with respect to interpreting the act to regulate commerce so as reasonably to accomplish "the great public purpose which it was enacted to subserve," see *New Haven R. R.* v. *Interstate Com. Com.*, 200 U. S. 361, 391, and *Armour Packing Company* v. *United States*, 209 U. S. 56, 72.

See also *Johnson* v. *Southern Pacific Company*, 196 U. S. 1, 17.

What is or is not an "emergency requiring immediate action," and what steps should be taken to protect the public interest, are by the act made administrative questions for the Commission to determine. The importance of the original jurisdiction of the Commission has been emphasized in many cases decided by this court. In *Director General et al.* v. *Viscose Company*, 254 U. S. 498, this court in holding that the lower court was without jurisdiction, in the first instance, to prevent a carrier from changing its freight classification so as to exclude silk from commodities to be accepted for shipment, used the following language at page 504:

> The contention of the carriers, faintly made, that the common law and not the interstate commerce act furnished the measure of their obligation to the public was promptly overruled by the Commission, informed, as it was, by wide experience in traffic affairs and in the administration of the act.
>
> The importance to the commerce of the country of the exclusive, initial jurisdiction which Congress has committed to the Interstate Commerce Commission need not be repeated and can not be overstated (*Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Baltimore & Ohio R. R. Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481; *Morrisdale Coal Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 304; *Minnesota Rate Cases*, 230 U. S. 352; *Texas & Pacific Ry. Co.* v. *American Tie Co.*, 234 U. S.

138, 146; *Pennsylvania R. R. Co.* v. *Clark Coal Co.*, 238 U. S. 456; 469, and *Loomis* v. *Lehigh Valley R. R. Co.*, 240 U. S. 43, 49). * * *

The Commission's finding that there was an emergency and its order made to protect the public in this emergency can not be set aside unless some provision of the Constitution has been contravened or the Commission's action is arbitrary or transcends the legitimate bounds of its authority. The courts will not substitute their judgment for that of the Commission upon matters purely administrative and will not disturb the Commission's finding because the facts would have warranted a different conclusion or because the Commission's action is deemed inexpedient or unwise. *Interstate Comm. Comm.* v. *Illinois Central Railroad*, 215 U. S. 452, 470; *United States* v. *Louis. & Nash. R. R.*, 235 U. S. 314, 320; *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 481, 488; and *Seaboard Air Line Ry. Co.* v. *United States*, 254 U. S. 57, 62.

The language of the Circuit Court of Appeals for the 4th Circuit in *Baltimore & O. R. R. Co.* v. *Lambert Run Coal Company*, 267 Fed. 776, is appropriate here, although this court later held (258 U. S. 377) that that court should not have taken jurisdiction or passed upon the merits of the case, because suit had not been originally instituted in the "three judge" court provided by statute. The language referred to was used concerning an emergency order (Service Order No. 8) of the Commission as to distributing coal cars, and is as follows (p. 780):

> The Commission having based their order on their opinion that an emergency such as was contemplated by the statute existed, it is not within the power of the court to annul their order on the ground that the administrative power conferred on the Commission was unwisely or improvidently exercised. *Interstate Comm. Comm.* v. *Ill. Cent. R. R.*, 215 U. S. 452, 478, 30 Sup. Ct. 155, 54 L. Ed. 280; *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553; 9 Ann. Cas. 1075.

In the present case if the Peoria & Pekin Union Railway Company had carried out its threat, one of the important arteries of the transportation system of this country would have been suddenly closed. The right of shippers to route traffic over the Minneapolis & St. Louis Railway Company through the Peoria gateway would have been denied, cars already in transit would have caused great congestion of traffic, and "the interest of the public and the commerce of the people" would have suffered. On such an occasion, and at a such a time, the Commission not only had a right to exercise its emergency powers but it was under an affirmative duty to do so to protect the public interest. This was true regardless of the private disputes between the carriers. See *United States* v. *Louisville & Nashville R. Co.*, 195 Fed. 88, 96, in which, prior to the legislation giving the commission emergency powers in respect to car service, the Commerce Court by mandamus required certain carriers to transport traffic over existing through routes

and under joint rates, regardless of their private disputes as to which should furnish cars for the transportation.

The Commission in the present case, as a last resort, exercised its emergency powers, after making every effort to bring about an adjustment of the controversy, at least, until the whole matter could be inquired into in the general investigation No. 14534, ordered by the Commission and set for hearing in Chicago on February 20, 1923.

2. THE SERVICE ORDER IS NOT UNCONSTITUTIONAL.

Paragraph (15) of section 1 of the act provides that the Commission may make "directions with respect to car service * * * upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable"; and provides that the Commission may authorize "the joint or common use of terminals" upon similar terms. Paragraph (16) of this section contains like provisions as to compensation. The statute thus makes full provision for a hearing and for compensation. The order, although silent as to compensation, must be read in connection with these provisions of the statute, and, when so considered, clearly does not violate the Constitution.

In the original proceeding, No. 13110, the Commission found the $4 intermediate charge published in appellant's tariff I. C. C. 36 to be unjustly dis-

criminatory against the Minneapolis & St. Louis Railroad, and in favor of the Burlington and Rock Island railroads, against which no similar charge was made. Later in I. & S. 1596 the Commission found that intermediate charges proposed by appellant on traffic interchanged with the Burlington and Rock Island were not justified, and that, because of the complexity of the entire subject matter of charges for services rendered at Peoria, a general investigation on the Commission's own motion should be instituted. This investigation was ordered in No. 14534. The Commission did not order the cancellation of the $4 charge published in tariff No. 36, but left the question of this charge open for determination in the general investigation. In this connection it is to be noted that, if the Peoria & Pekin Union Railway Company had imposed the $4 charge against the Minneapolis & St. Louis, this action would have been unjustly discriminatory under the decision in No. 13110. Furthermore, the tariff provided that this charge did not apply "to switching service for tenant companies under tenancy contracts," and one of the points in issue was whether or not the service fell within the tenancy contracts.

At this stage of the proceeding appellant, upon the refusal of the Minneapolis & St. Louis to pay the $4 charge, notified the commission that it would shut off all traffic interchanged with the Minneapolis & St. Louis at Peoria for delivery to connections. When it thus became apparent that appellant would

take this action, regardless of the provision made by the Commission to do justice to all parties in the general investigation, No. 14534, the Commission promptly exercised its emergency powers to protect the public interest.

In the light of this brief review of the facts, the commission's action, it is submitted, was clearly an appropriate means of carrying out the provisions of the statute and was not in violation of the Constitution.

In addition to what has been said, it is to be noted that the lower court pointed out (*supra*, page 2013):

> It is alleged and not disputed that the identical service commanded by the order has been performed for more than 40 years by plaintiff for the Burlington and Rock Island without any compensation being asked, and that that is the identical service which the Minneapolis & St. Louis is asking shall be performed for it without compensation. Of course, that could not be the basis for taking plaintiff's property without compensation, but it does present a very strong argument why the public should not be inconvenienced and suffer a discontinuance of that service while the Interstate Commerce Commission is investigating the question as to whether such a service should be compensated for; and if so, what shall be the basis of the compensation.

Appellant tries to make it appear that the Commission's service order required one carrier to perform a service for another carrier during an emergency. This is not the case. The Commission did

not order appellant to perform in an emergency a service which ordinarily was performed by the Minneapolis & St. Louis Railroad Company. At the time the order was issued, and prior to that time, appellant was performing an interchange service between the rails of the Minneapolis & St. Louis Railroad in Peoria and appellant's yard in East Peoria as a part of the through transportation of traffic over through routes and under through rates through Peoria. The Commission's order merely required appellant as a common carrier subject to the act to continue to perform for shippers this part of the through transportation service which appellant had theretofore customarily performed. The service was required not for the Minneapolis & St. Louis Railroad but for shippers, and was not a new service but one which appellant had previously performed. The question as to appellant's compensation, as between the carriers, for performing this part of the through transportation was left open for settlement by the carriers, if they could agree upon a settlement, and if not, they were left free under the express provisions of the act to ask the Commission to determine the question. The service order showed on its face that the Commission had already instituted a general investigation (No. 14534), in which an effort would be made to pass upon this and similar questions and to do justice as far as possible to all parties concerned.

The mere fact that the question as to compensation was left for later determination, in case the carriers

could not agree, can not be seriously questioned as being in violation of the fifth amendment to the Constitution. The constitutionality of such a procedure seems to be well established. *New England Divisions Case, supra,* at page 201 of the opinion. The emergency power which the Commission is authorized to exercise under section 1 with respect to car service is similar to the power which the Commission has under section 15 to suspend proposed increases in rates, pending a hearing and decision by the Commission as to the reasonableness of such rates. The constitutionality of these provisions has never been questioned. It is interesting to note also that the Commission's power to prescribe joint rates and through routes, leaving the question of compensation as between the carriers for later determination, has been upheld as constitutional. *St. Louis S. W. Ry. Co.* v. *United States,* 245 U. S. 136, at page 143.

It was the evident purpose of the statute to place upon the Commission, as a body experienced in traffic matters, the affirmative duty of maintaining an adequate transportation system in the interest of the public and of preventing congestion and interruptions in the flow of traffic through the regular channels of commerce. It was also evidently the intent of the statute that the Commission should have the power to act immediately in accomplishing the purposes of the statute, and that it should not have to wait perhaps for months to decide questions of compensation as between the carriers, with the

transportation facilities furnished shippers in the meantime seriously impaired. The wisdom of this policy is strikingly illustrated in the present case. The statute makes ample provision for a hearing and for compensation, and the Commission through its general order of investigation fully provided for an adjustment of the disputes of appellant and its connecting carriers and the compensation to be paid for services performed by appellant.

In view of all the circumstances it seems that the Commission exercised powers which it had under the act, and which Congress intended it to have, and that it exercised these powers wisely in protecting the interest of the public and the commerce of the people.

For the reasons above set forth the appeal in this case should be dismissed.

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Appellee.

P. J. FARRELL,
Of Counsel.

WASHINGTON, D. C., *November, 1923.*

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